**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-2341**

In re the Custody of R. H. P., d.o.b. 11/20/2002:
Monty Marcel Prow, petitioner,
Appellant,

vs.

Trisha Harris Ball,
Respondent,

County of Dakota, intervenor,
Respondent.

**Filed August 19, 2013**
**Affirmed**
**Johnson, Chief Judge**

Dakota County District Court
File No. 19-F0-03-012712

Andrew M. Silverstein, Andrew M. Silverstein Law Office, L.L.C., Minneapolis, Minnesota (for appellant)

Jenny L. Ryan, Legal Assistance of Dakota County, Ltd., Apple Valley, Minnesota (for respondent Ball)

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Considered and decided by Rodenberg, Presiding Judge; Johnson, Chief Judge; and Connolly, Judge.

## U N P U B L I S H E D  O P I N I O N

**JOHNSON**, Chief Judge

Monty Marcel Prow and Trisha Harris Ball are the parents of R.H.P., a 10-year-old boy. Under a February 2009 order, Ball has permanent sole legal and physical custody, and Prow has no parenting time. In January 2011, Prow sought to modify the prior order to obtain a right to parenting time. The district court denied Prow's request and established certain conditions for any future motion to modify. We affirm.

## FACTS

Prow and Ball have one child together, R.H.P., who was born in November 2002. In 2003, pursuant to a stipulation, the district court ordered the parties to share joint legal and physical custody of R.H.P.

In November 2007, Ball moved to modify custody. She requested that the district court grant her sole legal and physical custody of R.H.P. and deny Prow parenting time. In support of the motion, Ball alleged that Prow had been charged on multiple felony counts of possession of illegal drugs, that Prow kept illegal drugs in his home where they were accessible to a child, and that Prow had sexually abused R.H.P. The district court determined that Ball had established a *prima facie* case that R.H.P. was endangered while in Prow's care.

In February 2009, the district court granted Ball's motion to modify, awarding her permanent sole legal and physical custody of R.H.P. and denying Prow parenting time. At that time, the district court also imposed three conditions with which Prow must comply before the court would award him parenting time: (1) that he submit to a

psychosexual evaluation, (2) that he submit to a chemical-dependency evaluation, and (3) that he complete a reunification assessment. Prow appealed from that order, and this court affirmed. *In re Custody of R.H.P.*, No. A09-1251, 2010 WL 1850526, at *13 (Minn. App. May 11, 2010), *review denied* (Minn. July 20, 2010).

In January 2011, the guardian *ad litem*, Dorothy Gause, filed a written report with the district court, stating that Prow had failed to comply with the conditions in the February 2009 order and recommending that Prow's parenting time remain suspended until Prow complies with the conditions. Gause also requested to be dismissed from the case. The district court issued an order dismissing Gause and stating that it would re-appoint a guardian *ad litem* if Prow moved for a modification of custody or parenting time. Prow contacted the district court by telephone to schedule a hearing on a motion concerning parenting time. Shortly thereafter, the district court appointed Beth Johnson to be the new guardian *ad litem*.

In February 2011, the district court advised the parties by letter that it would set a hearing on a motion for parenting time after the new guardian *ad litem* had the opportunity to assess Prow's compliance with the requirements in the February 2009 order. The district court specifically outlined the procedure that would apply: (1) Prow should make a motion for parenting time in writing without a hearing; (2) Prow should provide a progress report to the guardian *ad litem* regarding his compliance with the conditions in the February 2009 order; (3) the guardian *ad litem* should issue an updated report; (4) if the guardian *ad litem* found that Prow had made progress, the parties should

agree to parenting time for Prow; and (5) if the parties could not agree, the district court would schedule an evidentiary hearing.

Prow did not serve or file a written motion to modify parenting time. Nonetheless, in August 2011, Beth Johnson submitted a written report in which she recommended that Prow and R.H.P. begin a reunification process with the help of a reunification therapist, Molly Cronin. In September 2011, Ball wrote to the district court to object to Beth Johnson's recommendations. The district court scheduled an evidentiary hearing, the scope of which was "limited to the recommendations issued by the Guardian ad Litem." Before the hearing, Ball filed a motion *in limine*, requesting that the district court determine that Prow has the burden of establishing that modification of parenting time is in R.H.P.'s best interests. The district court granted Ball's motion.

The district court held an evidentiary hearing over three days: January 5, 2012; March 13, 2012; and May 16, 2012. Prow testified on his own behalf and called Beth Johnson as a witness. Ball testified on her own behalf and called four witnesses: Dr. Melissa Parkhurst, R.H.P.'s former therapist; Gause, the former guardian *ad litem*; Stacy Johnson, R.H.P.'s therapist; and Mindy Mitnick, a licensed psychologist.

In August 2012, the district court issued an order in which it found that commencing reunification therapy was not in the best interests of the child. The district court stated "three primary reasons" for this finding: (1) R.H.P. has unresolved mental-health issues, (2) Cronin is not an appropriate person to provide reunification services, and (3) Prow has not taken the necessary steps to begin reunification with R.H.P. The district court noted that it was rejecting the recommendation of Beth Johnson, the

guardian *ad litem*, because the court had "a great deal more information than did Ms. Johnson at the time she made her recommendations." The district court noted that Beth Johnson "did not have the opportunity to meet with the child's therapists or make an independent inquiry into Ms. Cronin's therapies or [the] conclusions" of the psychosexual evaluator selected by Prow, Dr. Eli Coleman.

Based on its finding that reunification is not in R.H.P.'s best interests at this time, the district court denied Prow's request for a modification of parenting time and ordered Prow to not have contact with R.H.P. The district court also ordered that R.H.P. should continue his therapy with Stacy Johnson and that he must submit a letter to the court when R.H.P. completes a therapy protocol known as PRACTICE. The district court ruled that Prow may not move for a modification of parenting time unless and until R.H.P. completes all steps in the PRACTICE protocol. The district court also required that, in connection with any future motion to modify, Prow must provide six months of verifiable negative drug-testing results, must have completed a forensic psychological evaluation, and must follow any recommendations arising from that evaluation.

Prow appeals.

## D E C I S I O N

Prow makes two basic arguments. First, he challenges the denial of his motion to modify parenting time. Second, he challenges the imposition of conditions on a future motion to modify.

**I.**

Prow argues that the district court erred by denying his motion to modify parenting time by not allowing him to begin reunification therapy with R.H.P.

The "ultimate issue" in disputes over parenting time is whether the proposed arrangement is in the child's best interests "as assessed under the totality of the considered factors." *Hagen v. Schirmers*, 783 N.W.2d 212, 216 (Minn. App. 2010). On appeal from child custody proceedings, this court reviews the district court's findings of fact under a clearly erroneous standard of review. *Soohoo v. Johnson*, 731 N.W.2d 815, 825 (Minn. 2007). In making that assessment, a reviewing court defers to the district court's opportunity to evaluate the credibility of the witnesses. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). The district court has broad discretion to make the ultimate determination of parenting time. *Hagen*, 783 N.W.2d at 215.

As an initial matter, Prow challenges the district court's *in limine* ruling that he bears the burden of proof on the issue whether a modification of parenting time is in R.H.P.'s best interests. As a general rule, the party moving to modify a parenting-time order has the burden of establishing that the proposed modification is in the best interests of the child. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978). Prow contends that the general rule does not apply in this case because he never actually served or filed a motion to modify. The record indicates that the district court scheduled an evidentiary hearing because Prow had contacted the court and expressed his intention to request a modification of the February 2009 order with respect to parenting time. In granting Ball's motion *in limine*, the district court reasoned that, although Prow had not formally

filed a motion, "the comments and correspondence of [Prow] and his counsel make clear that he is seeking to re-establish a relationship with the child in a therapeutic setting." At no time in the process did Prow disclaim any interests in modification. It seems that Prow wanted a modification of the prior order but did not want to assume the usual burden of establishing an entitlement to modification. The district court reasonably construed the situation by deeming Prow to have made a motion, which imposed on him the burden of proof. *Cf.* Minn. R. Civ. P. 15.02 (providing that "issues not raised by the pleadings" may be tried by "implied consent"). Thus, the district court did not err by assigning to Prow the burden of establishing that a modification is in R.H.P.'s best interests.

With respect to the merits of the district court's order denying modification, Prow challenges each of the district court's three primary reasons for denying Prow's request.

**A.**

First, Prow challenges the district court's finding that reunification is inappropriate at this time because R.H.P. has unresolved mental-health issues. The district court found that R.H.P. was suffering from post-traumatic stress disorder as a result of sexual abuse by Prow and was not ready to participate in reunification. For this finding, the district court expressly relied on the testimony of Dr. Parkhurst and Stacy Johnson, whom the district court deemed to be credible. We must defer to the district court's credibility determinations. *Goldman*, 748 N.W.2d at 284.

Prow does not directly challenge the district court's finding that R.H.P. has unresolved mental-health issues. Rather, Prow contends that he lacked access to R.H.P.'s

therapy records and that Ball did not cooperate with the reunification assessment because she did not ensure that R.H.P. was receiving ongoing therapy. Prow did not raise these issues in the district court, however, and the scope of the evidentiary hearing was "limited to the recommendations issued by the Guardian ad Litem." Thus, we decline to consider these arguments on appeal.

Thus, the district court's finding that R.H.P. has unresolved mental-health issues is supported by the evidence.

**B.**

Second, Prow challenges the district court's finding that Cronin is not an appropriate reunification therapist. The district court found that Cronin was not an appropriate reunification therapist because she was providing individual therapy to Prow. Cronin's therapy notes show that she was giving individual therapy to Prow, and Gause testified that she would not have approved Cronin as a reunification therapist if she had known that Cronin was providing individual therapy to Prow. The district court's finding that Cronin is not an appropriate reunification therapist is supported by the evidence.

Prow contends that the district court's finding concerning Cronin "ignores the distinction between the identity of the person to facilitate reunification therapy and/or a reunification assessment and whether R.H.P.'s best interests are served by reunification." But Cronin is the only reunification therapist Prow proposed in his request for modification. Prow has not argued that Ball or the district court had the obligation to propose a different therapist. Furthermore, Cronin's evaluation was incorporated into

Beth Johnson's recommendation that reunification therapy begin, which influenced the district court's decision to reject Beth Johnson's recommendation.

Thus, the district court's finding that Cronin is not an appropriate reunification therapist is supported by the evidence.

**C.**

Third, Prow challenges the district court's finding that he had failed to comply with the conditions in the February 2009 order. Specifically, Prow challenges the district court's findings that: (1) he did not complete a psychosexual evaluation, (2) he did not complete a chemical-dependency evaluation, and (3) he was not ready for reunification.

**1.**

Prow contends that the district court erred by determining that Prow did not complete a psychosexual evaluation because his psychosexual evaluation was unreliable. Specifically, Prow contends that the district court erred by relying on a 2008 Minnesota Multiphasic Personality Inventory-2 (MMPI-2) assessment, which was improperly scored, and ignoring a 2009 MMPI-2 assessment, which was properly scored. Prow's contention misconstrues the district court's order. The district court found that Dr. Coleman's psychosexual evaluation was unreliable because Dr. Coleman improperly relied on the 2008 assessment. Given its finding that Dr. Coleman did not apply professionally acceptable standards, the district court found that Prow had not satisfied the requirement that he complete a psychosexual evaluation.

The district court's finding concerning Dr. Coleman's psychosexual evaluation is supported by the testimony of Mitnick, who testified that Dr. Coleman improperly relied

on the 2008 assessment because it was administered one-and-one-half years before Dr. Coleman's psychosexual evaluation and because it was improperly hand-scored. Contrary to Prow's argument, the district court did not ignore the 2009 assessment; the existence of the 2009 assessment does not make the psychosexual evaluation reliable because Dr. Coleman also relied, improperly, on the 2008 assessment to reach his conclusions.

Prow also contends that the district court erred by rejecting Dr. Coleman's psychosexual evaluation because Gause, the first guardian *ad litem*, selected Dr. Coleman as an evaluator. He asserts that it "defies logic, common sense and reason" to presume that a guardian *ad litem* would select a psychiatrist who lacked the necessary qualifications. In determining that the psychosexual evaluation was improper, however, the district court relied largely on the testimony of Mitnick, who pointed out many flaws in Dr. Coleman's evaluation. The district court found Mitnick's testimony credible, and we must defer to that finding. *See Goldman*, 748 N.W.2d 284.

**2.**

Prow contends that the district court erred by finding that Prow did not comply with the condition that he complete a chemical-dependency evaluation. Specifically, Prow contends that he "made an extensive and candid self-report of his prior drug use and chemical health" and that the district court failed to make findings regarding Prow's six-week outpatient chemical-dependency treatment program.

The district court acknowledged that Prow submitted to a chemical-dependency evaluation but found that he did not comply with the conditions imposed in the February

2009 order because of the nature of the tests. Specifically, the district court was unable to verify that Prow truly had abstained from drug use because the drug testing to which he submitted was non-random. The district court also found that Prow did not comply because "it was also the Court's intention that [Prow] comply with the recommendations of that assessment" but Prow did not follow through on the recommendations of the assessment. These findings are not challenged and are supported by the evidence.

**3.**

Prow contends that the district court erred by finding that he is not ready for reunification. Prow asserts that he "testified credibly that he loves his son and is able to compartmentalize his disappointment with [Ball] so that he can pursue reunification."

The district court, however, found that Prow was "unwilling to acknowledge that he has taken actions causing harm to the child," "has continued to view himself as a victim of false accusations and has continued in his unsupported belief that [Ball] is 'sick in the head' and 'brainwashing' the child." The district court also found that Prow "continues to act out in anger." The district court noted an incident during the evidentiary hearing in which Prow "had an outburst" and "stormed out of the courtroom after accusing [Ball] of 'ruining [their] son' while she sat quietly on the witness stand." The district court found that Prow's inability to control himself "coupled with all of the evidence of his statements denying the abuse found by the Court, compounds the uncertainty regarding [Prow's] readiness for reunification." Prow does not directly challenge these findings but, rather, asserts that he testified credibly about his love for his

son. The district court did not find that Prow does not love his son; the district court found merely that Prow is not ready for reunification.

Thus, the district court's finding that Prow failed to comply with the conditions in the February 2009 order is supported by the evidence. The district court's findings support the district court's ultimate conclusion that modification of the parenting-time order is not in R.H.P.'s best interests at this time.

**II.**

Prow also argues that the district court erred by imposing conditions that he must satisfy before he may move to modify his parenting time in the future.

Parenting time may be restricted or denied pursuant to the following statute:

> If the court finds, after a hearing, that parenting time with a parent is likely to endanger the child's physical or emotional health or impair the child's emotional development, the court shall restrict parenting time with that parent as to time, place, duration, or supervision and may deny parenting time entirely, as the circumstances warrant.

Minn. Stat. § 518.175 (2012). If a district court restricts or denies parenting time, the district court also may choose to require the parent to satisfy certain preconditions before reinstating parenting time. *See D.A.H. v. G.A.H.*, 371 N.W.2d 1, 4-5 (Minn. App. 1985), *review denied* (Minn. Sept. 19, 1985).

Prow challenges the preconditions of a future motion to modify his parenting time. First, he contends that the district court erred by requiring him to comply with requirements that are based on the requirements in the February 2009 order: (1) complete six months of verifiable negative drug testing results, (2) complete a forensic

psychological evaluation by an approved psychologist, and (3) complete all recommendations resulting from the psychological evaluation. Prow contends only that he did not have notice that the district court would impose "additional conditions." But the conditions about which he complains are not new issues. Rather, the conditions that apply to the future are best described as clarifications of the conditions that the district court imposed in the February 2009 order. *See Johnson v. Johnson*, 627 N.W.2d 359, 363 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001).

Second, Prow contends that the district court erred by precluding him from moving for modification of parenting time unless and until the district court receives a letter from R.H.P.'s current therapist, Stacy Johnson, stating that R.H.P. has completed the PRACTICE protocol. Prow's challenge consists only of various hypothetical situations that illustrate potential problems with this requirement, such as the possibilities that Stacy Johnson may decide to change the therapy protocol, that Ball may decide not to take R.H.P. to therapy, or that Stacy Johnson may decline to write a letter to the district court. Prow does not suggest that any of these events actually have occurred. Prow could seek some appropriate form of relief if one of the scenarios he describes actually arises. The district court's order prevents Prow from bringing a motion to modify his parenting time; it does not preclude Prow from bringing other types of motions.

We conclude that the district court did not err by imposing preconditions on a future motion by Prow to modify the parenting-time provision of the February 2009 custody order.

**Affirmed.**